

**COMMENTS OF EXELON GENERATION COMPANY, LLC AND
CONSTELLATION NEWENERGY, INC.
ON THE ILLINOIS POWER AGENCY'S DRAFT 2012 PROCUREMENT PLAN**

Now comes Exelon Generation Company, LLC and Constellation NewEnergy, Inc. (collectively, "Exelon") and, pursuant to Section 16-111.5 of the Public Utilities Act (220 ILCS 5/16-111.5) (the "Act"), submits these comments to the Illinois Power Agency ("IPA") draft procurement plan ("Draft Plan") for the generation supply to eligible retail customers of Commonwealth Edison Company ("ComEd") and Ameren Illinois ("Ameren") for the period of June 2013 through May 2018.

I. Background

Exelon Generation Company, LLC ("Exelon Generation") owns approximately 35,000 megawatts ("MW") of generation, including nuclear, fossil, hydroelectric, solar, landfill gas, and wind generation assets. It is the nation's largest nuclear operator with 17 reactors located in Illinois, Pennsylvania and New Jersey and has a growing renewable energy business. It is the nation's ninth largest wind energy generator. In addition, Exelon Generation operates the nation's largest urban solar power plant, Exelon City Solar, a 10 MW solar installation located on a 41-acre brownfield in Chicago, and two of the largest hydroelectric facilities in the Eastern United States, Conowingo Hydroelectric Generating Station and Muddy Run Pumped Storage Facility totaling nearly 1,600 MWs of capacity. Exelon Generation markets wholesale energy and capacity products to municipal, cooperative, and investor-owned utilities, retail suppliers, retail energy aggregators, merchant participants, power marketers, and major commodity trading houses.

Exelon Generation, individually or through its subsidiaries, has participated in the competitive procurement processes under which contracts for the electricity needs of Ameren and ComEd have been awarded since the end of the transition period at the end of 2006. Exelon Generation has been an active participant in all of the Commission and IPA proceedings and workshops related to the adoption and development of procurement plans for ComEd and Ameren and has been a successful participant in many of these procurement events over the past few years.

Constellation NewEnergy, Inc. (“CNE”) provides electricity and energy-related services to retail customers in Illinois as well as in 15 other states and the District of Columbia, and serves over 14,000 megawatts of load and over 10,000 customers. CNE holds a certificate as an alternative retail electric supplier (“ARES”) from the Commission to engage in the competitive sale of electric service to retail customers in Illinois. Since the introduction of customer choice in the Illinois electric industry in 1999, CNE has actively participated in the Illinois retail market. CNE has actively participated in nearly every regulatory proceeding before the Commission involving electric industry restructuring and has served as an advocate for fair and competitive open markets that are designed to provide customers with an array of competitive options. Additionally, CNE is one of the nation’s leading solar developers, designing, financing, and constructing solar projects that can help Illinois meet its renewable portfolio standard and solar carve-out. In addition, CNE provides service to thousands of Illinois homeowners and renters.

As described in the Draft Plan, dramatic decline in load forecasts have lead to an oversupply of energy and renewables. The current procurement situation provides very

clear evidence of the importance of taking a thoughtful, measured approach to future procurements to protect competition, at the wholesale and retail level, and to avoid the creation of stranded costs. Based upon its experiences in procurement events in Illinois and elsewhere, and its experience serving industrial, commercial, and residential customers, Exelon has a number of recommendations to improve the IPA's draft procurement plan.

II. RECOMMENDATIONS

Based on its expertise over the years in procurement events in Illinois and other jurisdictions, its experiences in Illinois as an ARES, and as a leading solar developer, Exelon makes the following observations and proposes the following recommendations for improvements to the draft procurement plan to be overseen by the IPA:

- The process improvements will lead to efficiencies and more robust participation (whenever or if any future procurement event is held).
- The proposed FutureGen Power Purchase Agreement (PPA) requires a number of key modifications.
- The proposed use of the Alternative Compliance Payment (ACP) funds is questionable.
- The bidding rules for the proposed distributed generation (DG) procurement should be altered.

A. Process Improvements

Exelon commends the IPA's commitment to making improvements to the auction documents and processes that will expedite the process, reduce administrative redundancies, and aid in streamlining future procurements, including the following:

- Notifying winning bidders as expeditiously as the law allows;
- Harmonizing pre-bid letters of credit so that there will be a single credit form;
- Utilizing a previously executed EEI Master Agreement and long form agreement for procurement events for the 2013 and subsequent Plan; and
- Standardizing procurement documents.

(*Id.* at 91-92) In numerous past proceedings, Exelon has advocated for these changes, which will no doubt be beneficial to bidders and winning suppliers in future procurements.

B. FutureGen PPA requires modification

The Draft Plan includes a sourcing agreement for a contemplated repowered/retrofitted clean coal facility, known as FutureGen. (IPA Plan, p. 73 *et seq.*) Whether the legal authority to require ARES to enter into sourcing agreements with FutureGen exists is the subject of much debate; however, Exelon takes no position on that in this filing. Rather, these comments will focus on the fact that, aside from questions regarding any underlying statutory authority, the sourcing agreement provided by FutureGen and included in the IPA Draft Plan is unworkable in its current form.

There are two over-arching issues with the current sourcing agreement. First, the sourcing agreement appears to have been drafted with a focus on the relationship between

FutureGen and regulated utilities. As a result, several of the sections designed to protect buyers are deficient when applied to ARES, and should be modified so as to not place ARES at a competitive disadvantage. Second, in addition to the sourcing agreement's focus on utilities as the counter-party, the sourcing agreement shows an obvious bias toward FutureGen, and is not an agreement in which parties are given equal commercial rights. Exelon's specific comments below attempt to ameliorate that bias.

Definitions

There are many items which are simply left blank in the proposed sourcing agreement, including the Target Commercial Operation Date and Outside Commercial Operation Date. All blanks need to be filled in, and terms defined, within the agreement before it is sent for Commission review. As for the appropriate amount of time, a 90 day period between Target Commercial Operation Date and Outside Commercial Operation Date would be reasonable, but in no event should the Outside Commercial Operation Date be more than 180 days after the Target Commercial Operation Date.

Article 2

Article 2 contains a five year extension option for continuation of the sourcing agreement. As currently drafted, that extension option lies solely within the discretion of FutureGen. There is no rationale for giving one party the sole discretion to continue the agreement beyond the initial term. Accordingly, whether or not the sourcing agreement is to be extended should be by mutual agreement of the signatories.

Article 3

To the extent ARES are legally required to enter into a sourcing agreement, they should only be required to do so if a mirror sourcing agreement has been executed by all utilities and all ARES. To do otherwise would place those ARES that had executed a sourcing agreement at a serious competitive disadvantage from ARES and/or utilities who had not been required to enter into an identical sourcing agreement. This should be made an express condition precedent.

Article 5

The Seller's ability to recover costs requires greater controls, particularly given the fact that the sourcing agreement is not a competitive procurement but, rather, is a sole-source contract, the costs of which electric customers will ultimately pay. Necessary controls include a required filing with the Commission regarding the anticipated costs of the project, as well as Buyer and Commission audit rights. In addition, the sourcing agreement does not contain a proposed Formula Rate but, rather, indicates that the rate will be developed by Seller prior to Commission approval. Given the fact that the IPA is submitting the sourcing agreement for Commission approval imminently, the proposed final Formula Rate needs to be included now, and the sourcing agreement must make clear that the Formula Rate is subject to Commission review and approval. That Formula Rate should include as credits any proceeds that FutureGen receives from sales of any products or services, or monies obtained from any other source. It should likewise be clear that the Commission has the ability to thoroughly evaluate the costs and proposed Formula Rate, just as it evaluates claimed costs and proposed rates of electric utilities. Buyers should not be required to support any filing by Seller seeking Commission

approval; rather, they are free to challenge the justness and reasonableness of any claimed costs, or the appropriateness of any proposed Formula Rate. Along those lines, Seller should provide the projected costs for inclusion with the sourcing agreement to be reviewed by the Commission, and should either be capped at recovery not to exceed 10% above the anticipated project costs and/or Buyers should obtain notice of, and have veto power over, non-essential changes to the project that will materially impact the initial operating budget and thus the amount of recoverable costs.

Additionally, this Article is very focused on Buyer cost recovery for traditional utilities. To the extent it is also intended to cover ARES, modifications are required. The sourcing agreement needs to be modified to specify when, how, and how often the “Contract Prices” can be changed, in order to give ARES some certainty so they can appropriately price their contracts. Otherwise, the sourcing agreement could adversely affect competition by requiring ARES to build a premium into their prices to account for this risk, thereby further raising retail rates. Setting a Contract Price on an annual basis through a docketed Commission proceeding is most appropriate, and gives Buyers the necessary opportunity to review and challenge the claimed costs, as well as to make recommendations to the Formula, while providing much-needed stability in the retail market that costs under the sourcing agreement will not be changing for Buyers every month with little notice. Finally, there needs to be an assurance that the utilities and ARES would always pay the same rate, such that if cost recovery is denied for the utility based on rate cap or other limitations, those costs must not be shifted to ARES or their customers.

Article 6

The sourcing agreement refers in several places to a Buyer's "share" or "proportionate share". This needs to be defined, with consideration given for a competitive market that is likely to see a great deal of load shifting, new market entrants, exits from the market, etc., particularly for a contract of this length. Specifically, the sourcing agreement should include a formula, based on Final Buyer Retail Sales divided by Total Retail Load for the same month (the latter of which is as yet an undefined term).

Article 15

The credit provisions should be struck. Buyers should not be compelled to agree to specific terms now, without knowing anything about the financing/lender. Rather, it should be left to the parties to negotiate customary and commercially reasonable lender consent documents.

The sourcing agreement needs specific language of what a Buyer would be entitled to in the event of a Seller default. The damages Seller would be entitled to are much more clearly spelled out, and should explicitly indicate that a default by one Buyer will not increase the share of any other.

Article 17

As currently drafted, if the Seller exercises early termination rights, they have no obligation to Buyer, even in the event there is an energy shortfall. That situation should be remedied, such that Buyer should be refunded costs already paid for energy that has not been delivered.

Article 20

The force majeure provision should be bilateral, and there should be a 12 month maximum, after which either party may terminate the agreement with notice to the other party.

C. Use of ACP Funds Is Questionable

The Draft Plan clearly demonstrates some of the complexities associated with mandating long-term contracts, for any resource. In 2010, in accordance with a previous IPA Plan and following a competitive procurement, utilities executed 20-year contracts for bundled renewable energy and renewable energy credits. Since that time, there has been a dramatic shift in competition for residential and small commercial customers, resulting in significant load migration away from the utilities (*Id.* at 16-17), with more migration anticipated in the balance of the planning horizon as a result of a number of communities that have or will implement municipal aggregation for electric load. (*Id.* at 18)

Given the amount of load migrating to ARES as a result of this robust competition, there is likely an insufficient number of bundled utility customers to support the commitments made to renewable energy resources through competitive procurements in previous years within the statutory price cap. (*Id.* at 3) Consequently, due to the costs exceeding the cost cap, the utilities' ability to accept the full amount of contracted renewable energy resources under the long term contract lies in question. As noted by the IPA, "The long-term bundled REC and energy purchases made in 2010, before there

was a practical appreciation of how quickly and successfully customers would choose alternate electricity suppliers, are becoming **the new generation of stranded costs.**” (*Id.* at 81). (Emphasis added.)

The Draft Plan contemplates two potential means of dealing with the current situation. First, the IPA is considering using its Renewable Energy Resources Fund, funded by ACPs made by the ARES to comply with at least 50% of the RPS requirements and administered by the IPA pursuant to Section 1-56 of the IPA Act, to help mitigate payment risk for these long-term contracts (*Id.* at 3). In addition, the IPA proposes to use the ACP payments that have been collected by Ameren and ComEd from their respective hourly-priced service customers to be collectively used as necessary to supplement payment to the suppliers to the extent such payment would exceed the individual utility renewable resource budget caps in a given year. (*Id.* at 3)

Without admitting or denying the IPA’s legal authority to use the Renewable Energy Resource Fund as proposed in this year’s Draft Plan, Exelon does not oppose the proposal in recognition of the fact that the IPA has inherited a difficult situation in that commitments were made under long term renewable procurements that are not necessarily sustainable by utility bundled customers within the statutory rate cap. However, lack of opposition to use of those funds for this year’s Draft Plan should not be interpreted as agreement with this proposal as it relates to monies collected from ARES, nor shall it be construed as the appropriateness of such a proposal for future years. As the Draft Plan acknowledges, this proposal would convert funds collected from ARES and their customers that are supposed to be used to purchase renewable energy credits on behalf of ARES, and instead use them to finance a utility contract for the benefit of

eligible retail customers. (*Id.* at 82) Additionally, the statute's directive that ACP payments are to be used to "purchase renewable energy credits" (220 ILCS 5/16-115D) (d) (4)) may limit how those funds may be used and notwithstanding Exelon's position in this filing, it fully reserves the right to challenge the IPA's use of these funds in the future.

D. Balance the Procurement Across all Sizes of Solar Development.

The Draft Plan includes a new Distributed Generation ("DG") component, with two products: one for individual generators less than 25 kW, and a second product for generators between 25kW and 2MW. (*Id.*, pp. 84-88). This is a positive addition, in that DG sources, including solar, provide many benefits. These benefits include the reduced need for new transmission, reduced line losses as distributed energy is generated and consumed on-site, reduced distribution upgrades through the extension of useful lives of lines and transformers, reduced need to upgrade transformers to support load growth, and enhanced distribution system performance through electricity counter-flow and reduced low-end voltage variations. A competitive DG market in Illinois would be expected to spur competition, which would bring downward pressure to costs for the solar industry throughout Illinois, and benefit ratepayers accordingly

Exelon commends the IPA for conducting a series of workshops on DG, in order to obtain useful feedback in advance of filing the Draft Plan. The IPA accurately summarized the key discussion points, including the following:

Experience with project financing by developers in other states suggests that while leasing equipment to a homeowner rather than selling it to him/her may make more sense, a PPA model that accomplishes the same cash flow is preferable from a tax standpoint. Developers do not want to

become an ARES. This may require revisiting ARES rules, or creating an exception for PPAs associated with DG financing structures.

(*Id.* at 83) This is an important observation, given that the third-party model in Illinois requires that the entity be licensed as an ARES. PPAs, which are the main means of deploying solar, would be effectively ineligible since the average solar developer is not an ARES.

One improvement that can be made to the DG proposal is with respect to bidding rules. Experience in other jurisdictions has shown that it is necessary to discourage underbidding and place-holding from developers without the intent to actually bring projects to fruition. Too often, developers have deliberately under-bid into auctions, or held spaces in queues for the sole purpose of re-selling their place in line at a higher price. Proof of executed contracts is already required in the 25kW and over category in the proposed procurement. However, since developers submitting in the small (under 25kW) category need a minimum of 40 contracts to hit the 1MW threshold, there is far greater risk that developers will claim a 1MW block but will not be able to deliver in a timely manner – sending confusing market signals to other developers, suppressing competition, and raising prices. Obscurity in oncoming supply has caused severe hiccups in market growth in other states.

In order to combat that potential problem, the IPA should require that 50% of a 1MW block be under contract before bid submission. With that combination of customers under contract and room to sign up new customers, the IPA has some assurance of deliverability, while at the same time other developers have a clearer view of oncoming supply, allowing them to effectively compete. Real-time data from the program administrator should be provided, in order for developers to have a clear sense

of what load is still available; armed with that information, they should be able to plan their sales cycles accordingly.

III. Conclusion

As we enter into a new era of retail electric competition in Illinois, it is essential that the IPA Plan preserve the competitive marketplace where it is robust, and take steps to enhance competition in those areas that are ripe for growth. Exelon therefore recommends that the IPA Draft Plan be modified as described herein.

Respectfully Submitted,

A handwritten signature in black ink that reads "Cynthia Fonner Brady". The signature is written in a cursive, flowing style.

Cynthia Fonner Brady
Assistant General Counsel
Exelon Business Services Group
4300 Winfield Road
Warrenville, IL 60555
630.657.4449
Cynthia.brady@constellation.com

Dated: September 14, 2012